HONG LEONG BANK BHD A

v.

HSUI FONG MACHINERY (M) SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA B
ZAINUN ALI JCA
WAN ADNAN MUHAMAD JCA
KANG HWEE GEE JCA
[CIVIL APPEAL NO: P-02(IM)-806-2008]
2 JULY 2009 C

CIVIL PROCEDURE: *Appeal - Fresh evidence - Admission of - Whether evidence sought to introduce at the appeal unavailable or that reasonable diligence would not have made it so available - Whether motion dismissed* D

CIVIL PROCEDURE: *Striking out - Application for - Whether applicant had locus standi to file application - Whether application unsustainable - Whether dismissed*

Enclosure 8a was a motion by the applicant for leave to introduce E
new evidence in the appeal which was pending before the Court of Appeal. Enclosure 13a was a motion to strike out the applicant's application encl. 8a citing that the applicant did not have *locus standi*. The applicant had granted a loan facility to Johnny Ong Eng Chong ("Johnny") who defaulted in the repayment of the loan. F
Consequently, the applicant had to act to exercise its right under the deed of assignment to sell the property to recover the sums outstanding on the loan. It then discovered from a land search at the land office that individual land title had been issued on the property and the third respondent had become the registered G
proprietor of the said property. The applicant claimed that the third respondent had obtained title to the property by making an application to intervene in the Winding up Petition No. 28-97-2001 and used the two orders it obtained from the High Court as a vesting order to register itself at the land office as the registered H
proprietor of the said property. To protect its equitable interest in the property, the applicant had to act to file an application for leave to intervene in the said winding up petition and thereafter to set aside the two orders obtained by the third respondent and to direct the Pentadbir Tanah to cancel the registration of the third I

A respondent as the registered proprietor. Its application for leave to intervene before the High Court was however dismissed. The new evidence that the applicant now sought to introduce was essentially evidence that the third respondent was not the registered proprietor of the property. According to the applicant, the new land office
B search showed that the registered proprietor of the property was Bandar Pelangi Sdn Bhd the seller of the property to the purchaser Johnny and not the third respondent.

Held (dismissing encl. 8a and 13a)
C **Per Kang Hwee Gee JCA delivering the judgment of the court:**

(1) By its own admission, the applicant had known of the alleged mistake in the first land office search in wrongly stating the third respondent as the registered proprietor of the property. The
D opportunity was wide open for the applicant to obtain from the appropriate officer at the land office an affidavit stating the exact status of the land in question and if necessary to compel him by an order of *mandamus* to do so. The applicant did not avail itself of such an opportunity. It was also open to the
E applicant to apply for a *subpoena duces tecum* by leave of the court to enable the appropriate officer to produce the record of the land office at the hearing. Further, it was well within its disposal to obtain any such affidavit evidence from Bandar Pelangi Sdn Bhd the registered proprietor of the property in
F question to prove the proprietorship of Bandar Pelangi in the property. The evidence the applicant now sought to introduce at the appeal was unavailable to the applicant or that reasonable diligence would not have made it so available. Therefore, this motion was dismissed. (para 14)

G **(2)** Enclosure 13a was a motion to strike out the applicant's application encl. 8a. It was premised on the ground that the applicant did not have the *locus standi* to file the application encl. 8a as it had yet to become a party in the proceeding in the High Court winding up petition having failed in its
H application for leave to intervene in that petition and that in any case the applicant had no 'legal interest or any other interest' in this application as Johnny was not the registered proprietor of the land in question. The application was plainly unsustainable. The right of the applicant in encl. 8a to admit
I new evidence was derived from its right to appeal against the decision of the High Court in refusing it the leave to intervene. Therefore, encl. 13a was dismissed. (paras 18, 19 & 20)

Bahasa Malaysia *Translation Of Headnotes*

Lampiran 8a adalah usul oleh pemohon untuk kebenaran membawa masuk keterangan baru di dalam rayuan yang menunggu penyelesaian di hadapan Mahkamah Rayuan. Lampiran 13a adalah usul untuk membatalkan permohonan pemohon lampiran 8a atas alasan bahawa pemohon tidak mempunyai *locus standi*. Pemohon telah memberi kemudahan pinjaman kepada Johnny Ong Eng Chong ("Johnny") yang telah gagal membayar balik pinjaman. Sebagai akibatnya, pemohon perlu bertindak dalam melaksanakan haknya di bawah surat ikatan penyerahanhak untuk menjual hartanah untuk menuntut jumlah yang belum dibayar di bawah pinjaman tersebut. Ia seterusnya mendapat tahu dari pencarian tanah di pejabat tanah bahawa hakmilik tanah berseorangan telah dikeluarkan ke atas hartanah tersebut dan responden ketiga telah menjadi tuan punya berdaftar hartanah tersebut. Pemohon mendakwa bahawa responden ketiga telah memperolehi hakmilik atas hartanah tersebut dengan membuat permohonan mencelah dalam Petisyen Penggulungan No. 28-97-2001 dan telah menggunakan dua perintah yang diperolehinya dari Mahkamah Tinggi sebagai perintah letakhak untuk mendaftarkan dirinya di pejabat tanah sebagai tuan punya berdaftar hartanah tersebut. Untuk melindungi kepentingan berekuitinya di dalam hartanah tersebut, pemohon terpaksa memfailkan permohonan untuk kebenaran mencelah di dalam petisyen penggulungan tersebut dan seterusnya mengenepikan kedua-dua perintah yang diperolehi oleh responden ketiga dan mengarahkan Pentadbir Tanah untuk membatalkan pendaftaran responden ketiga sebagai tuan punya berdaftar hartanah. Permohonannya untuk kebenaran mencelah di hadapan Mahkamah Tinggi walaubagaimanapun telah ditolak. Keterangan baru yang ingin dibawa masuk oleh pemohon pada asasnya adalah keterangan bahawa responden ketiga bukan tuan punya berdaftar hartanah tersebut. Menurut pemohon, pencarian baru di pejabat tanah menunjukkan bahawa tuan punya berdaftar hartanah tersebut adalah Bandar Pelangi Sdn Bhd iaitu penjual hartanah kepada pembeli Johnny dan bukan responden ketiga.

Diputuskan (menolak lampiran 8a dan 13a)
Oleh Kang Hwee Gee HMR menyampaikan penghakiman mahkamah:

(1) Dari pengakuannya sendiri, pemohon berpengetahuan mengenai kesalahan yang didakwa di dalam pencarian pertama di pejabat tanah di mana responden ketiga telah dinyatakan dengan salah

A sebagai tuan punya berdaftar hartanah tersebut. Peluang wujud untuk pemohon memperolehi daripada pegawai yang berkenaan di pejabat tanah satu afidavit menyatakan status sebenar hartanah tersebut dan jika perlu untuk memaksanya melalui perintah *mandamus* untuk berbuat demikian. Pemohon tidak
B mengambil peluang tersebut. Ia juga terbuka kepada pemohon untuk memohon *subpoena duces tecum* untuk kebenaran mahkamah supaya pegawai berkenaan boleh mengemukakan rekod pejabat tanah semasa perbicaraan. Seterusnya, ia adalah dalam tangan pemohon untuk memperolehi keterangan afidavit
C dari Bandar Pelangi Sdn Bhd tuan punya berdaftar hartanah tersebut untuk membuktikan ketuanpunyaan Bandar Pelangi. Keterangan yang kini dipohon oleh pemohon untuk dibawa masuk ke rayuan ini tidak boleh terlaksana kepadanya atau ketekunan munasabah tidak membenarkan ia boleh dilaksanakan.

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(2) Lampiran 13a adalah usul untuk membatalkan permohonan pemohon lampiran 8a. Ia berdasarkan atas alasan pemohon tidak mempunyai *locus standi* untuk memfailkan lampiran 8a kerana ia bukan salah satu pihak di dalam prosiding petisyen penggulungan
E Mahkamah Tinggi atas kegagalannya memperolehi kebenaran untuk mencelah petisyen tersebut dan pemohon tidak mempunyai 'kepentingan di sisi undang-undang atau apa-apa kepentingan' kerana Johnny bukan tuan punya berdaftar hartanah tersebut. Permohonan adalah dengan jelas dan nyata
F tidak boleh dipertahankan. Hak pemohon di lampiran 8a untuk membawa masuk keterangan baru didapati dari haknya untuk merayu terhadap keputusan Mahkamah Tinggi yang tidak membenarkan kebenaran untuk mencelah. Oleh itu, lampiran 13a ditolak.

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Case(s) referred to:
Ladd v. Marshall [1954] 3 All ER 745 ***(refd)***

Legislation referred to:
Rules of the Court of Appeal 1994, r. 7(3A)

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For the appellant - Chang Choong Hoe; M/s Wong-Chooi & Mohd Nor
For the 1st respondent - Unrepresented
For the 2nd respondent - T/n Mohammed Azmi & Assocs (absent)
For the 3rd respondent - B Murugayah; M/s Murugayah Balasubramaniam & Co

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[Appeal from High Court, Pulau Pinang; Companies Winding-up No: 28-97-2001-1]

Reported by Suhainah Wahiduddin

JUDGMENT

Kang Hwee Gee JCA:

[1] Enclosure 8a is a motion by the applicant for leave to introduce new evidence in the appeal which is pending before the Court of Appeal and due to be heard shortly.

[2] The applicant is the appellant in the appeal against the decision of the Penang High Court in dismissing the appellant's application for leave to intervene in the Winding-Up Petition No. 28-97-2001-1.

[3] The said petition at the High Court was presented by Hsui Fong Machinery (M) Sdn Bhd against the respondent Saeilo (Penang) Sdn Bhd.

[4] The applicant claimed that it had granted a loan facility to a person called Johnny Ong Eng Chong to purchase a property from Bandar Pelangi Sdn Bhd. As the land on which the property was to be built was undergoing sub-division and hence individual title was unavailable then, the applicant accepted a deed of assignment of the property as security.

[5] The said Johnny Ong Eng Chong defaulted in the repayment of the loan. Consequently the applicant had to act to exercise its right under the deed of assignment to sell the property to recover the sums outstanding on the loan. It then discovered from a land search at the land office that individual land title had been issued on the property and the 3rd respondent had now become the registered proprietor of the said property.

[6] It is unclear from the record of appeal how the 3rd respondent obtained a registrable transfer of the property. In so far as it can be understood from the record of appeal, the applicant claimed that the 3rd respondent had obtained title to the property by making an application to intervene in the Winding-Up Petition No. 28-97-2001-1 and used the two orders it obtained from the High Court as a vesting order to register itself at the land office as the registered proprietor of the said property on 25 June 2003.

[7] To protect its equitable interest in the property, the applicant had to act to file an application for leave to intervene in the said Winding-Up Petition No. 28-97-2001-1 and thereafter to set aside

A the two orders obtained by the 3rd respondent and to direct the Pentadbir Tanah to cancel the registration of the 3rd respondent as the registered proprietor.

[8] Its application for leave to intervene before the High Court
B was however dismissed principally on the ground that the issue document of title which was produced and exhibited as "NS1" by the 3rd respondent at the hearing showed unequivocally that the 3rd respondent Saeilo Japan (M) Sdn Bhd was the registered proprietor as early as 17 April 1996 well before the applicant obtained the
C deed of assignment of 7 October 1997 from Johnny Ong Eng Chong. The learned High Court judge dismissed the application holding rightly or wrongly that the applicant had no legal interest in the property which it could legally caveat and that the 3rd respondent had every right to obtain the orders of the High Court
D dated 30 April 2002 and 12 May 2003 to safeguard its interest.

[9] After the dismissal of its application, the applicant subsequently discovered that the land office search which it had earlier obtained on 31 July 2006 contained mistakes. It had now obtained a new land office search dated 6 March 2009 which now
E shows that the 3rd respondent was never registered as a proprietor of the said property.

[10] The rule governing the introduction of new evidence at the appellate stage is necessarily stringent. The underlying principle is
F to avoid prolonged and inconclusive litigation. It requires all evidence necessary to support a party's case to be introduced at the hearing itself and not later after the verdict at the appellate stage.

[11] To succeed in its application to introduce further evidence of
G the land office search in the coming appeal before the Court of Appeal, the applicant has to satisfy the test in *Ladd v. Marshall* [1954] 3 All ER 745 CA which is now given statutory recognition in r. 7(3A) of the Rules of the Court of Appeal 1994 which provides as follows:

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> At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that:
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> (a) at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the
I party seeking to use it, or that reasonable diligence would not have made it so available;

(b) The new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate Court as the case may be.

[12] The new evidence that the applicant now seeks to introduce is essentially evidence that the 3rd respondent was not the registered proprietor of the property purchased by Johnny Ong Eng Chong to whom the loan was granted. It intends to do so by introducing the new land office search dated 6 March 2009 which will now show that the 3rd respondent was not the registered proprietor as it had claimed at the hearing by the production of the issue document of title. The new land office search now shows that the registered proprietor of the property was Bandar Pelangi Sdn Bhd the seller of the property to the purchaser Johnny Ong Eng Chong and not the 3rd respondent.

[13] Much as we agree with the submission of counsel for the applicant that the evidence sought to be introduced may have a determining influence on the decision of the High Court we are however unable to agree that it was not available to the applicant or that reasonable diligence would not have made it so available.

[14] By its own admission, the applicant had known of the alleged mistake in the first land office search in wrongly stating the 3rd respondent as the registered proprietor of the property. It had been well appraised of the fact that the land office had refused to reply to its two letters (respectively of 8 January 2007 and 1 March 2007) requesting clarification on the proprietorship of the 3rd respondent on the said property. This was well over a year before the date of hearing. The opportunity was wide open for the applicant to obtain from the appropriate officer at the land office an affidavit stating the exact status of the land in question and if necessary to compel him by an order of *mandamus* to do so. The applicant did not avail itself of such an opportunity. It was also open to the applicant to apply for a *subpoena duces tecum* by leave of the court to enable the appropriate officer to produce the record of the land office at the hearing.

[15] Further, the applicant did not have to rely only on the land office search in order to prove that the 3rd respondent (Saeilo Japan (M) Sdn Bhd) was in fact not the registered proprietor at the time when it granted the loan to purchase the said property to Johnny Ong Eng Chong.

A **[16]** It was well within its disposal to obtain any such affidavit evidence from Bandar Pelangi Sdn Bhd the registered proprietor of the property in question to prove the proprietorship of Bandar Pelangi in the property (backed by a verified copy of the issue document of title in the possession of Bandar Pelangi before the
B issuance of individual titles and if available by a verified copy of the title after sub-division and conversion)

[17] We are therefore unanimous in our finding that the evidence it now seeks to introduce at the appeal was unavailable to the
C applicant or that reasonable diligence would not have made it so available. We are therefore constrained to dismiss this motion with costs.

[18] Enclosure 13a is a motion to strike out the applicant's application encl. 8a.
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[19] It is premised on the ground that the applicant does not have the *locus standi* to file the application encl. 8a as it has yet to become a party in the proceeding in the Penang High Court Winding-Up Petition No. 28-97-2001-1 having failed in its
E application for leave to intervene in that petition and that in any case the applicant has no "legal interest or any other interest" in this application as Johnny Ong Eng Chong was not the registered proprietor of the land in question.

F **[20]** The application is plainly unsustainable. The right of the applicant in encl. 8a to admit new evidence is derived from its right to appeal against the decision of the High Court in refusing it the leave to intervene.

G Enclosure 13a is dismissed.

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